In the Matter of

AMPARO GONZALEZ, widow of ANTONIO REYES, deceased,
Claimant

v.

MERCHANT BUILDING MAINTENANCE,
Employer,

and

CNA INSURANCE COMPANIES,
Carrier.

DATE: SEPTEMBER 1, 1998

OALJ Case No. 98-LHC-814
OWCP Case No. 18-63487

DECISION AND ORDER
GRANTING MOTION FOR SUMMARY DECISION

The above-entitled matter is currently scheduled for formal hearing during the week commencing September 14, 1998 in San Diego, California. On August 19, 1998, the undersigned received Merchants Building Maintenance and CNA Insurance Company's (hereinafter "Employer") Motion for Summary Decision. Thereafter, the undersigned issued an Order to Show Cause to Claimant as to why such Motion should not be granted. Claimant responded within the time required on August 28, 1998.

Based on Employer's Motion for Summary Decision and Claimant's Response thereto, I make the following conclusions of law, and so order.

I. Facts

There is no dispute regarding the facts in the instant matter. Antonio Reyes worked for Merchants Building Maintenance as a janitor for approximately four years. Mr. Reyes was responsible for cleaning and re-stocking the restrooms and portable toilets throughout the shipyard and aboard ship. Employer's Exhibit 2; Claimant's Exhibit 2. During the course of Mr. Reyes' work day, he would go aboard ship several times (approximately 2-3 times daily). Claimant's Exhibit 2.

On June 25, 1996, Mr. Reyes suffered an injury to his right upper extremity while cleaning

a bathroom on Employer's shipyard. Employer's Exhibit 1. Although Claimant was conservatively treated for his injury, it was subsequently determined that surgery was necessary. Mr. Reyes died in December of 1996; at such time surgery had been authorized but had not yet been scheduled. On January 6, 1997, Amparo Gonzalez Garcia, filed a claim for widow's benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA" or the "Act"), alleging that Antonio Reyes' death was attributable to the industrial injury that he suffered while in the employ of Employer.

II. Standard of Review for a Motion for Summary Decision

The Motion for Summary Decision is governed by 29 C.F.R. §§ 18.40, 18.41. A party opposing a motion for summary decision must set forth specific facts showing that there is a genuine issue of material fact to be determined at the hearing. 29 C.F.R. § 18.40(c). In Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1, 4 (1990) (citation omitted), the Benefits Review Board clarified such standard, stating that the party opposing the motion for summary decision "must establish the existence of a genuine issue of fact which is both material and genuine, material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute." In addition, the court must look at the record in the light most favorable to the party opposing the motion, and must draw all inferences favorable to the party opposing the motion.

III. Analysis

The basis of Employer's Motion for Summary Decision is whether Antonio Reyes is a covered employee under the meaning of the Act. Coverage under the LHWCA is determined by the status and situs tests. 33 U.S.C. §§ 902(3), 903(a); Northwest Marine Terminals v. Caputo, 432 U.S. 249 (1977). Employer does not dispute that the injury which Antonio Reyes suffered on June 25, 1996 while on the shipyard of Employer sufficiently establishes situs under the Act. Employer's Motion, p. 3, n.1. Thus, the only issue left to be determined is Mr. Reyes' status. *See* Claimant's Response, pps. 2-3.

The status requirement as outlined in Section 2(3) of the Act defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairmen, shipbuilder, and ship-breaker . . . ." 33 U.S.C. § 902(3). Thus, as there is no claim that Mr. Reyes engaged in longshoring operations, in order for Mr. Reyes to be a covered employee under the Act, he must either be a maritime employee or a harbor-worker "directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in loading, or unloading, repair or construction of ships)." Hurston v. McGray Construction Co., 29 BRBS 127 (1995). However, such work must be "a necessary link in the chain of work that result[s] in ships being built and repaired." Graziano v. General Dynamics Corp., 14 BRBS 52, 56 (1st Cir. 1981).

Claimant contends that "[t]he need for Mr. Reyes to go aboard ship was not merely incidental or on rare occasion but several times daily. Mr. Reyes [sic] duties in facilitating the work of those actually building the ship were an integral part of the shipbuilding process. Bathroom facilities are located aboard the ship so as to reduce the time spent by employees of the shipyard taking care of basic necessities and allow them more time to actually perform the shipbuilding work. Without the facilities the shipbuilding process is slowed down." Claimant's Response, p. 3. This argument is deficient in many respects.

First, two cases recently decided by the Office of Administrative Law Judges, Turner v. Newport News and Shipbuilding and Dry Dock Co., 32 BRBS 98 (ALJ) (1998) and Sears v. Newport News Shipbuilding and Dry Dock Co., 31 BRBS 475 (ALJ) (1997), have found that a janitor, while successful in establishing situs, failed to establish status. Both cases found an insufficient nexus between the janitorial duties and the hazards associated with shipbuilding and repair. Claimant argues that the distinguishing factor between the two aforesaid cases and the instant matter is that Mr. Reyes' work included actually boarding a ship several times a day. This distinguishing element is unpersuasive, as Mr. Reyes' duties were not maritime in nature and are wholly unskilled maintenance. Rather, such work is more typical of "support services performed in any production entity, maritime or not." Dravo Corp. v. Banks, 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977).

Moreover, jurisprudence has repeatedly dictated that the "maritime employment" is "an occupational test that focuses on loading and unloading." The amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423-24 (1985) (citations omitted). The Supreme Court subsequently clarified this rule in Chesapeake & Ohio Railway Co. v. Schwalb, 493 U.S. 40, 47-48 (1989), stating that claimants at a relevant situs, engaging in activity that is an integral or essential part of loading or unloading a vessel are covered under the LHWCA. Thus, workers are covered by the Act if they are injured while maintaining or repairing equipment essential to the loading or unloading process, and where the loading process could not continue unless the equipment the claimants worked on was operating properly.

There are no facts showing that Mr. Reyes' employment involved any aspect of the process of loading, unloading, repairing or building vessels. Although Mr. Reyes was injured on a shipyard, he was not in any sense engaged in loading, unloading, repairing or building a vessel, and his de minimis connection to maritime activity is simply insufficient to fulfill the status requirement of the LHWCA. Further, Claimant's argument that Mr. Reyes' duties as a bathroom janitor "were an integral part of the shipbuilding process" is wholly unpersuasive. *See* Coloma v. Director, OWCP, 897 F.2d 394, 400-01 (9th Cir. 1990) (court declined to confer status to a cook whose primary function was to provide meals to seamen, longshore and harbor-workers even though claimant argued that his work was essential because it permitted crew members performing the loading and unloading to remain aboard the vessel during such operations). The maintenance of the bathrooms aboard the ship is not a basic necessity to shipbuilders, as they

could use portable toilets on the shipyard. Moreover, if the bathrooms aboard the ship stopped functioning adequately, the shipbuilders could still continue their work. Although Claimant's assertion that the shipbuilding process would be slowed without such facilities is accurate, there is no dependence between Mr. Reyes' duties and the shipbuilding.

Mr. Reyes cannot be considered an "employee" within the meaning of the Act because his employment does not satisfy the status requirement for jurisdiction under the Act. Even construing the record in a light most favorable to Claimant, there is no genuine issue of material fact to be decided. Mr. Reyes' duties were strictly janitorial, and he was in no way performing a task connected with the building, repairing, loading or unloading of ships. His duties were merely incidental to the shipbuilding operation, not exposing him to any of the hazards of shipbuilding that the Act was designed to cover. The prevailing case law all militate against a finding of jurisdiction in favor of Claimant.

ORDER

It is hereby order that Employer's Motion for Summary Decision is granted, and that the matter herein is dismissed.

HENRY B. LASKY
Administrative Law Judge

Dated:
San Francisco, California

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